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Nos. 83-858 and 83-860

In the Supreme Court of the United States

OCTOBER TERM, 1983

LEONARD RAY BLANTON, PETITIONER

v.

UNITED STATES OF AMERICA

CLYDE EDWARD HOOD JR. AND JAMES M. ALLEN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the trial judge abused his discretion or denied petitioners a fair trial by the manner in which he conducted the jury voir dire regarding pretrial publicity.

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OPINIONS BELOW

The panel opinion of the court of appeals (Pet. App. 4a-32a)[1] is reported at 700 F.2d 298. The opinion of the en banc court (Pet. App. 33a-96a) is reported at 719 F.2d 815.

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[1] "Pet. App." refers to the petitioner's appendix in No. 83-858.

JURISDICTION

The judgment of the en banc court was entered on September 28, 1983. The petition for a writ of certiorari in No. 83-858 was filed on November 23, 1983. The petition in No. 83-860 was filed on November 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Middle District of Tennessee, each petitioner was convicted on six counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of conspiracy, in violation of 18 U.S.C. 371. Blanton was also convicted on three additional mail fraud counts, and on one count of interfering with commerce by threats or violence, in violation of the Hobbs Act, 18 U.S.C. 1951. Hood was acquitted on three mail fraud counts and on the Hobbs Act count. The district court dismissed three mail fraud counts and the Hobbs Act count as to Allen. Blanton was sentenced to three years' imprisonment and fined $11,000. Allen and Hood were sentenced to terms of two years' and 18 months' imprisonment respectively, and each was fined $14,000. The en banc court of appeals affirmed (Pet. App. 33a-96a).

2. The evidence at trial showed that during Blanton's four-year tenure as Governor of Tennessee (1975 to 1979) he, together with Allen and Hood, who were on Blanton's staff, conspired to procure state liquor licenses for Blanton's friends and others in exchange for a share in the liquor stores' profits. In furtherance of the scheme Blanton appointed two of the three commissioners of the Tennessee Alcoholic Beverage Commission (ABC), who in turn selected

Blanton allies as director and assistant director of the ABC. Allen was put in charge of selecting liquor licensees even though he had no position at the ABC; he also helped arrange for the ABC chairman to acquire an illegal interest in a liquor store and attempted to acquire a concealed interest in a liquor store for himself (Pet. App. 35a-36a). Hood advised the ABC director who Blanton's friends were so that they would receive licenses; Hood also received a share of the profits of some of the newly licensed stores (*ibid.*).

The principal evidence against petitioners was the videotaped deposition of Jack Ham, a contributor to Blanton's campaign.[2] Blanton had arranged for a liquor license for Ham and approved a transfer of Ham's liquor license to a more lucrative location in exchange for a 20% share of Ham's profits. The kickback was paid in the form of a purchase of $23,000 in worthless oil stock by Ham from Blanton. Allen and Hood intervened with the ABC to secure the transfer of Ham's license, and Hood suggested that Ham pay Blanton's share of the profits by buying the worthless oil stock (Pet. App. 35a-36a).

3. Petitioners' trial was preceded by considerable publicity. The record contains more than 240 articles from Nashville newspapers concerning this prosecution and other activities of petitioners. 75 articles which appeared while Blanton was governor

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[2] Ham's trial testimony was introduced in the form of a videotaped deposition pursuant to Rule 15 of the Federal Rules of Criminal Procedure because Ham was in poor health. Ham had agreed to testify in exchange for immunity from federal prosecution and civil tax liability, and the ABC agreed not to revoke his liquor license on the basis of his truthful testimony (Pet. App. 38a).

concerned patronage in his administration and the improper pardon of state prisoners. There were 22 articles about Ham's deposition, the last of which appeared four months before the trial. Much of the original indictment was published verbatim. 160 articles were published within six months of the trial concerning this prosecution, the prosecution of Blanton's brother and of former Blanton aides, and improper pardons of prisoners. In addition, there was an offer of proof concerning the testimony of news directors of three Nashville television stations about the pretrial publicity (Pet. App. 38a-39a).

The nature of the voir dire conducted by the trial judge[3] is described by the en banc court (Pet. App. 40a-41a) (quoting *id.* at 10a-11a):

> The trial court conducted the voir dire *en masse*. It seated a group of veniremen in the jury box and directed questions at that group, but instructed the rest of the veniremen in the courtroom to listen to and pay attention to the questions as the questions would apply equally to all those selected. During the course of the voir dire the trial court pointed out that the case had been the subject of considerable media attention. It commented that it was sure that all the veniremen had heard about the case, and that some of them may have formed a tentative opinion concerning the probable guilt or innocence of the defendants. The court then said to the veniremen:

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[3] All of the district judges in the Middle District of Tennessee disqualified themselves. The voir dire was conducted by Judge John W. Peck, Senior Judge of the Sixth Circuit Court of Appeals, who excused himself after the first day of testimony at trial because of the sudden illness and subsequent death of his wife (Pet. App. 46a n.2).

> [T]he test is, will you be able to put from your minds whatever you may have seen and heard, and any opinion which you may have tentatively reached, and then to decide this case solely on the facts as you determine them to be, on the sole basis of the evidence which will be adduced in this trial after application of the appropriate law?

One juror was excused because she indicated she could not be impartial. As new veniremen entered the jury box to replace the ones who were excused for whatever reason, the trial court would ask them essentially the same question on pretrial publicity. It usually said it wanted to "particularly emphasize" the point. Out of ninety-two veniremen examined, a total of thirteen were excused because they indicated they had an opinion or prejudice they could not put aside. Of these thirteen, four linked their prejudice to pretrial publicity. Seven of these thirteen were excused when they said they had an opinion, without the court inquiring into the nature or strength of the opinion or whether it could be put aside. Twenty-nine other veniremen were excused for cause for other reasons and the parties excused twenty-eight others with their peremptory challenges.

4. The panel of the court of appeals reversed petitioners' convictions. It held that, in light of the pretrial publicity, the trial court's failure to question prospective jurors individually and its reliance on the veniremen's assurances of impartiality was not adequate to determine which of the jurors should have been excused for cause, and did not provide defense counsel with sufficient information to exercise their peremptory challenges intelligently (Pet. App. 10a-24a).

The court thereafter granted rehearing en banc and affirmed petitioners' convictions (Pet. App. 33a-96a). The en banc court observed (*id.* at 41a-42a) that, in forgoing individual questioning of veniremen, the trial judge "acted on the assumption that all potential jurors in this case had been subjected to some portion of the massive media coverage concerning [petitioners.]" Thus one of the trial court's "major problems was how to choose a jury without having all potential jurors repeatedly exposed or reexposed to adverse media opinion before the trial even started." The en banc court stated that, although the trial judge "probably" did not use the "best procedure possible" for selecting a jury—since some questioning of individual jurors in chambers or at the bench might have been effectively employed—the judge's conduct of the voir dire did not violate any per se rule established by this Court and was within the trial court's discretion (Pet. App. 40a, 45a-46a, 65a). The court concluded that the procedures adopted by the trial judge, which included "1) extensive questioning concerning prior media impact and juror associations, coupled with many dismissals based on even hints of possible prejudice, 2) very substantial increases in the number of peremptory challenges available to each defendant (30 in all), and 3) reliance on defendants' use of detailed questionnaires concerning all potential jurors coupled with sensitive responses by the court to any of defendants' challenges arising from such use," were "both fair and effective" and resulted in "an impartial jury" (*id.* at 50a, 65a).[4]

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[4] Judge Kennedy, who joined the court's opinion, also wrote a brief separate concurrence saying that petitioners had waived their objections to the conduct of the voir dire (Pet. App. 66a).

Judge Engel, a member of the original panel, joined by Judges Martin, Jones, and Keith, dissented.[5] He would have reversed the convictions in the exercise of the court's supervisory power (Pet. App. 68a), believing that the trial court's failure to question the jurors individually about "the sources and intensity of their exposure to pretrial publicity" "adversely prejudiced the ability of the court and counsel to weigh challenges for cause," and had a "profoundly debilitating effect upon the intelligent use of peremptory challenges" (Pet. App. 71a, 76a).

ARGUMENT

Petitioners contend (83-858 Pet. 9-22; 83-860 Pet. 10-19) that the trial court's failure to ask individual jurors about their exposure to pretrial publicity, and to inquire whether they held an opinion about the case, impaired their right to an impartial jury. They argue that the en banc court's contrary conclusion conflicts with decisions of this Court and of other courts of appeals. Petitioners also contend (83-858 Pet. 22-25; 83-860 Pet. 15) that the trial court's action deprived them of the right to exercise their peremptory challenges. These contentions are without merit.

1. It is axiomatic that a trial judge has broad discretion in conducting the voir dire. Rule 24(a) (Fed. R. Crim. P.) specifically affirms the breadth

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[5] Judge Keith (like Judge Engel, a member of the original panel) also wrote a separate dissent, expressing the view that the conduct of the voir dire here violated the Sixth Amendment right to a "fair and impartial trial" (Pet. App. 93a).

of this discretion.[6] This Court has emphasized the same point:

> [T]he adequacy of *voir dire* is not easily subject to appellate review. The trial judge's function at this point in the trial is not unlike that of the jurors later on in the trial. Both must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions. See *Ristaino* v. *Ross*, 424 U.S. 589, 595 (1976), quoting *Rideau* v. *Louisiana*, 373 U.S. 723, 733 (1963) (Clark, J., dissenting). In neither instance can an appellate court easily second-guess the conclusions of the decisionmaker who heard and observed the witnesses.
>
> Because the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the *voir dire*. In *Aldridge* v. *United States*, 283 U.S. 308 (1931), the Court recognized the broad role of the trial court: "[T]he questions to the prospective jurors were put by the court, and the court had a broad discretion as to the questions to be asked." *Id.*, at 310. See also *Ham* v. *South Carolina*, 409 U.S.

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[6] Rule 24(a) provides (emphasis added):

> The court *may permit* the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors *or may itself conduct the examination*. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry *as it deems proper* or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys *as it deems proper*.

524, 528 (1973) (recognizing "the traditionally broad discretion accorded to the trial judge in conducting *voir dire* . . .").

Rosales-Lopez v. *United States*, 451 U.S. 182, 188-189 (1981).

The principal objective of the voir dire is to preserve the defendant's right to an impartial jury. But that right does not entitle the accused to jurors who are "totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication * * * [t]o hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin* v. *Dowd*, 366 U.S. 717, 722-723 (1961).

a. The adequacy of the voir dire in this case is best shown by a review of the record. At the outset, the trial court told the venire that the "only purpose in undertaking this entire portion of the trial is to get the fairest and most impartial jury that it is possible to obtain" (Tr. 35), and it emphasized that in "fairness and honesty to the parties" the jurors should have "no reluctance whatever" to indicate any doubts they might have about their impartiality, so that they could "be excused from any further duties in the matter" (Tr. 36). To discourage reticence in disclosing bias, the court instructed the veniremen that there was nothing improper about not being able to be a fair and impartial juror in any particular case; the court repeated that instruction throughout the course of the voir dire (Tr. 35, 94, 111, 184-185).

After examining the venire about potential sources of bias unrelated to pretrial publicity,[7] the court stated (Tr. 56):

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[7] During the course of the voir dire the judge questioned the jurors about: whether any juror, or close relative of the juror, knew any of the defendants or members of the defendants' families (Tr. 38-50, 186-192); whether any juror, or close relative of the juror, contributed time, money, or support to Blanton or his opponents in any of his campaigns (Tr. 39-50, 186-192); whether any juror, or close relative of the juror, worked as a state employee while Blanton was governor (Tr. 39-50, 186-192); whether any juror had personal or professional contact with any of the attorneys involved in the trial (Tr. 50-54, 192-193); whether there was anything about the nature of the crimes charged that would make it difficult for any juror to be fair and impartial (Tr. 54-56, 194-195); whether any juror, or close relative of the juror, had been employed as a peace officer (Tr. 59-61, 131, 189-191); whether any juror could not accept the law as stated by the court in its charge to the jury (Tr. 61-62, 198-199); whether any juror could not accord each defendant the presumption of innocence (Tr. 62-63, 199-200); whether any juror was familiar with any of the prospective witnesses in the case (the court read the list of 150 witnesses to the jurors) (Tr. 71-73, 79-82, 130, 200-203, 205-212); whether any juror opposed the granting of immunity to witnesses (Tr. 73-78, 130-131, 203-205); whether any juror, or close relative of the juror, knew the government's case agent (Tr. 78-79, 193-194); whether any juror had any personal beliefs about alcoholic beverages that would influence his judgment (Tr. 84-87, 130, 156, 213-214); whether the length of the trial would impose any undue hardship on any juror (Tr. 91-94, 219-220); whether any juror knew of any other reason he could not be fair and impartial (Tr. 94, 214-215); whether any juror would have any problem deciding each defendant's guilt or innocence based on the evidence presented at trial (Tr. 94-95); whether any juror, or close relative of the juror, was employed by the City of Nashville (Tr. 101-103); and whether any juror would be unable to consider the charges against each defendant separately, even in light of the pretrial publicity about Blanton (Tr. 106-108).

> In the same general context, ladies and gentlemen, I recognize that partially because of the fact that these defendants held such offices, this entire matter has been the subject of attention of the news media. I am sure that all of you have at some time read something about this case in the newspaper, have heard something concerning it on the radio at some time, or have even seen or heard reference to it on television at some time.
>
> Similarly, it is entirely likely that some of you may have formed some tentative opinion concerning the probable guilt or innocence of some of the persons involved, including these defendants. However, the test to be applied in determining your qualifications to sit as jurors is not whether you have heard something about the case from the news media or whether you have formed any kind of a tentative opinion based on such reports. Rather—and I put this in the form of a question—the test is, will you be able to put from your minds whatever you may have seen and heard, and any opinion which you may have tentatively reached, and then to decide this case solely on the facts as you determine them to be, on the sole basis of the evidence which will be adduced in this trial after application of the appropriate law?

In varying language, the court repeated this question at least 19 times, addressing it to individual jurors and to the entire venire and, in most instances, stressing the importance of the matter (Tr. 56-59, 104-105, 106-108, 127, 129-130, 149-150, 153-154, 158-159, 167, 172-173, 177-178, 195-198, 225-226, 234-235, 239, 247, 257-258, 269, 272-273). At one point, after the prosecutor joined a defense motion for additional voir dire focusing upon news accounts about Blanton's aides selling pardons to state prison-

ers, the court addressed the venire as follows (Tr. 104-105):

> Ladies and gentlemen, I have talked a lot about pretrial publicity that has occurred in connection with this case, the fact that you probably have read, heard things about the case. I have not discussed with you the possibility that you may have been familiar with some of the publicity that surrounded Mr. Blanton at the end of his term of office as governor. It seems probable if you were living in this State and area at this time that you read and saw and heard something about the circumstances.
>
> Do any of you have recollection of any facts or circumstances which would cause you either to be inclined to hold that against Mr. Blanton, or on the other hand, to feel that he had been unfairly dealt with and should have been vindicated? We are going back a fair period of time.
>
> But I ask you carefully to search your memories and your consciences on that point. And I ask you as a follow-up to that, does any of you remember anything concerning the circumstance under which Mr. Blanton left the governor's office which would in any way affect your judgment in this case or render you incapable of being completely fair and impartial concerning him and his part in this case?

Moreover, as the en banc court observed (Pet. App. 42a), "the *voir dire* record * * * indicates that [the court] was sensitive to every suggestion of prejudice" and freely used his power to excuse for cause, exercising it 42 times. (In fact, considering individuals subjected to peremptory challenge, "70 out of a total of 92 veniremen were excused" (Pet. App. 41a)). The court promptly excused *every* juror who indicated

that he or she had formed an opinion about the case, without even inquiring into the strength of the opinion or whether it could be put aside. The following excerpts from the record illustrate the court's sensitivity to the slightest suggestion of bias attributable to pretrial publicity:

> THE COURT: I take it from your silence that none of you feel that he or she has been prejudiced by what you may have heard or seen. Yes, ma'am?
>
> JUROR NO. 1 (SHEILA GIBSON): I have been sitting here listening to you. And I am not sure that I would be impartial. I do have somewhat of an idea, from the things I have read and heard.
>
> THE COURT: Thank you very much. You may be excused [Tr. 57].
>
> * * * * *
>
> THE COURT: What is your name, sir?
>
> JUROR NO. 10 (LARRY G. WILLIAMS): Williams.
>
> THE COURT: Have you heard all the questions that have been asked here this morning and afternoon?
>
> MR. WILLIAMS: Yes, sir.
>
> THE COURT: Has anything that's been asked or said indicate to you any reason why you should not sit as a juror here?
>
> MR. WILLIAMS: Yes, sir. You mentioned the media. And the newspaper. That.
>
> THE COURT: You mean you have read them, and you have formed a conclusion?
>
> MR. WILLIAMS: Yes, sir.
>
> THE COURT: Very well, we appreciate your frankness. You may be excused [Tr. 146].
>
> * * * * *
>
> THE COURT: Albright. You have heard all these questions and statements here today?

MR. ALBRIGHT. Yes, sir.

THE COURT: Have any of them suggested to you any reason that you perhaps should not serve as a juror?

MR. ALBRIGHT: Well, sir, Your Honor, the only thing eating on me, before I realized that I would ever have the privilege to serve on this Jury, I made an opinion—I expressed that opinion to some of my friends.

THE COURT: Well, let's don't express it again.

MR. ALBRIGHT: I'm not going to express it.

THE COURT: Well, certainly in view of that, Mr. Albright, you may be excused.

MR. ALBRIGHT: Thank you, sir.

THE COURT: Thank you. [Tr. 147].

* * * * *

JUROR NO. 10 (ELIZABETH M. MILLER): Yes.

THE COURT: I will ask you the questions I have been asking. And you have heard all of the questions and statements that have been made here today? Would your answer to any question be any different than the other persons in the jury box?

MS. MILLER: Yes, I am afraid I have read enough about it that I would be unable to be fair.

THE COURT: So that you feel that you have some opinion that you might have difficulty with?

MS. MILLER: Yes, sir.

THE COURT: Thank you very much indeed, Ms. Miller, for your frankness. You may be excused [Tr. 157].

* * * * *

ALTERNATE NO. 1 (WALTER KENNETH MILLER): Yes.

THE COURT: Has anything suggested to you any reason you would have trouble being fair if selected as a juror?

MR. MILLER: Due to the extent of the coverage of the press, I have already formed an opinion. I feel like I would be an affected witness.

THE COURT: Very well, you may be excused [Tr. 267].

In addition, the court made the following cautionary remarks to the venire regarding bias, each petitioner's right to individual consideration, and the presumption of innocence:

It would be difficult or impossible for you to be fair and impartial if you had heard or read anything about this case and had reached any kind of a firm conclusion concerning it, or if you had a friend or relative who was involved either as a party or as a member of counsel or as a witness, particularly an important witness in this case. [Tr. 186.]

Ladies and gentlemen of the jury panel, I want to emphasize one line of inquiry which I may or may not have made sufficiently clear this morning. And I don't want to leave it to chance.

But we, of course, emphasize the fact that there are three individual defendants in this case, Mr. Blanton, Mr. Hood, and Mr. Allen. Now, the fact that they have been charged jointly does not mean in any sense that they need to be found guilty or not guilty. The charges against them are individually. And in returning a verdict, it will be necessary for you to consider all of them separately and to consider the case against the three defendants as individuals. [Tr. 106.]

One aspect of the laws of the greatest possible importance—and I therefore emphasize it to you separately. That aspect concerns the presumption of innocence which is possessed by these defendants. In these United States, every person is presumed to be innocent until and unless he is proven guilty beyond a reasonable doubt.

The returning of an indictment brings the person named before a court and jury for trial. But the returning of that indictment in no way destroys or impairs the presumption of innocence of the persons named. Thus, these three defendants, in spite of the returning of an indictment, continue to possess that presumption of innocence. And I ask each of you whether you have any difficulty in according to those three defendants or to any one of them the presumption of innocence to which they and he are entitled?

I assume from your silence that you do not. But to be absolutely certain, let me specifically ask of you whether as you look at Mr. Blanton, Mr. Hood, and Mr. Allen, as they are seated before you, do you have difficulty in regarding them as innocent of the charges in the indictment? And will you have any difficulty at all in according to them the presumption of innocence throughout this entire trial?

I repeat, ladies and gentlemen, that we regard that question as of the greatest importance. And I take it from your silence that you have no difficulty in according a presumption of innocence which has been described. [Tr. 62-63.]

Finally, as the en banc court observed (Pet. App. 50a), in addition to "extensive questioning concerning prior media impact and juror associations, coupled with many dismissals based on even hints of

possible prejudice," the court also granted "very substantial increases in the number of peremptory challenges available to each defendant" (10 for each, or 30 in all, of which 28 were exercised), and was sensitive to petitioners' challenges for cause based on their use of "detailed questionnaires concerning all potential jurors." See, *e.g.*, Tr. 64-69.

b. Against this background it is apparent that the district court did not commit reversible error solely because it declined to conduct an individual voir dire of each member on the question of pretrial publicity. See *United States* v. *Liddy*, 509 F.2d 428, 434-437 (D.C. Cir. 1974); *Margoles* v. *United States*, 407 F.2d 727, 732 (7th Cir.), cert. denied, 396 U.S. 833 (1969). Cf. *McCorquodale* v. *Balkcom*, 721 F.2d 1493 (11th Cir. 1983). As the original panel recognized, the pretrial publicity, though pervasive, "was not such that it was inherently prejudicial. It was [rather] * * * mostly factual and some of it was as critical of [petitioners'] chief accuser as it was of [petitioners]" (Pet. App. 20a). Cf. *Murphy* v. *Florida*, 421 U.S. 794, 800-801 n.4 (1975) ("we have in the past distinguished largely factual publicity from that which is invidious or inflammatory"); *Beck* v. *Washington*, 369 U.S. 541, 556 (1962). Despite their objection to pretrial publicity, petitioners did not request the court to sequester the jury (Tr. 17-19, 32-33). They did request, and received, a three-month continuance of the trial (R. 43), a "technique[] that can effectively mitigate any publicity." *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 602-603 (1976) (Brennan, J., concurring).

Moreover, though the jurors were not questioned individually about their exposure to publicity, they were repeatedly asked as a group about its possible effects. And in nearly 300 pages of voir dire there is

no indication of such "hostility to petitioner[s] by the jurors who served in [their] trial as to suggest a partiality that could not be laid aside." *Murphy* v. *Florida*, 421 U.S. at 800. As the en banc court noted (Pet. App. 61a):

> [T]he contrast between *Irvin* v. *Dowd*, [366 U.S. 717 (1961)], and [the] instant case is very great. In the *Irvin* case, Justice Clark pointed out:
>
> > Here the "pattern of deep and bitter prejudice" shown to be present throughout the community, cf. *Stroble* v. *California*, 343 U.S. 181, was clearly reflected in the sum total of the *voir dire* examination of a majority of the jurors finally placed in the jury box. Eight out of the 12 thought petitioner was guilty. With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations.
>
> In our present case *no* juror who helped determine the case expressed a pretrial conviction of [petitioners'] guilt.[8]

At the conclusion of the voir dire the court noted: "I have the view that the Jury that has been selected is as fair and impartial a Jury as could be obtained" (Tr. 291). See *Irvin* v. *Dowd*, 366 U.S. at 724

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[8] The court also observed (Pet. App. 65a):

> At the en banc hearing of this case, the author of this opinion asked lead counsel for Governor Blanton whether there was evidence of jury bias. The response was made wholly in relation to one juror and cited evidence which we deem quite inconclusive. We have searched this record for any other such evidence pertaining to periods before, during, or posttrial and have found none.

("findings of impartiality should be set aside only where prejudice is 'manifest' "). That observation is substantiated, in part, by the record of the jury's deliberations. The jury took seven days before returning a verdict; it ultimately acquitted Hood on four counts. A Nashville newspaper reported interviews with several jurors two days after they returned their verdict (R. 167, Exh. A). In that article the jurors described the steps they went through during their deliberations. It is apparent from their comments that their verdict was based on a careful examination of the evidence at trial, rather than on any preconceived notion of petitioners' guilt.

2. Petitioners nevertheless contend (83-858 Pet. 15-21; 83-860 Pet. 12-14) that the district court's failure to conduct an individual voir dire of each juror forced the court to accept the jurors' own assurances of impartiality. This result, they argue, conflicts with decisions in the First, Second, Fifth, Seventh, and Ninth Circuits. This contention is without merit.

None of the cases cited by petitioners holds that individual voir dire is inevitably required in the event of pretrial publicity.[9] Indeed it cannot be, since the

[9] In *Patriarca* v. *United States*, 402 F.2d 314 (1st Cir. 1968), cert. denied, 393 U.S. 1022 (1969), the court, while expressing its view of the desirability of such a practice, affirmed the defendants' convictions. In *United States ex rel. Bloeth* v. *Denno*, 313 F.2d 364, 372 (2d Cir.) (en banc), cert. denied, 372 U.S. 978 (1963), a case involving "highly inflammatory" publicity where eight of 16 jurors and alternates had formed an opinion of the defendant's guilt, the court of appeals held that the trial court should not have accepted the jurors' assurance of impartiality "in light of the nature of the publicity, the high proportion of jurors holding opinions of guilt, the length of time the opinions had been held and their per-

effect of publicity will vary greatly depending on its extent, content, and slant, the size of the community from which the jury is drawn, the nature of the crime, the time elapsed between publication and trial, and numerous other matters. The scope of inquiry must necessarily be determined in the first instance by the trial judge, who, after assessing these matters and the venire's response to his initial questions, can

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sistence." In *United States* v. *Davis*, 583 F.2d 190, 196-197 (5th Cir. 1978) (footnotes omitted), the court stated that "[t]hough separate examination of the jurors is sometimes preferable, it is not necessarily required." See also *United States* v. *Hawkins*, 658 F.2d 279, 285 (5th Cir. 1981) ("this does not mean that every case involving exposure to pretrial publicity automatically requires * * * 'time consuming, probing * * * individual voir dire' "). In *United States* v. *Dellinger*, 472 F.2d 340, 376-377 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973), the court stated that individual questioning "is of course one method. But even without individual questioning, the court could probe the impact of pretrial publicity without requiring the veniremen to describe what they had heard." *Silverthorne* v. *United States*, 400 F.2d 627 (9th Cir. 1968), was another case involving publicity "particularly adverse" to the defendant (400 F.2d at 631), where "almost thirty per cent of those examined expressed opinions of [the defendant's] guilt" (*id.* at 639). The court of appeals went no further, though, than to say that "under the circumstances of this case" (*ibid.*) it was an abuse of discretion not to interview the jurors individually, and that "we would *prefer*" more general use of such a procedure (*id.* at 639) (emphasis in original).

The other cases cited by petitioners (83-858 Pet. 18-19; 83-860 Pet. 12) are ones in which the defendants' convictions were affirmed. *United States* v. *Provenzano*, 620 F.2d 985 (3d Cir. 1980); *Brinlee* v. *Crisp*, 608 F.2d 839 (10th Cir. 1979) (affirming denial of habeas relief); *United States* v. *Caldwell*, 543 F.2d 1333 (D.C. Cir. 1974); *United States* v. *Liddy*, 509 F.2d 428, 434-437 (D.C. Cir. 1974); *United States* v. *Bryant*, 471 F.2d 1040, 1043-1045 (D.C. Cir. 1972), cert. denied, 409 U.S. 1112 (1973).

best decide on the spot how exhaustive an examination to undertake in light of the likelihood and evidence of bias.

In some of the cases cited by petitioners the voir dire was so inadequate that it simply gave no " 'reasonable assurance that prejudice would be discovered if present.' " *United States* v. *Hawkins*, 658 F.2d 279, 283 (5th Cir. 1981). See *United States* v. *Davis*, 583 F.2d 190, 196 (5th Cir. 1978) (trial court asked once whether the jury was affected by publicity; no juror responded); *United States* v. *Dellinger*, 472 F.2d 340, 372, 375 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973) (no reference to pretrial publicity at all; one general question whether the jury could be impartial). In this case, by contrast, the court raised the issue each time a new prospective juror or group of jurors entered the box—19 times in all. At the request of defense counsel, he also asked about pretrial publicity concerning the Blanton administration generally (Tr. 104-105).

In others of the cases cited by petitioners, there was convincing evidence of a pervasive prejudice that warranted further inquiry. See *United States ex rel. Bloeth* v. *Denno*, 313 F.2d at 367-368 (eight of 16 regular and alternate jurors had formed an opinion of guilt; 31 of 38 others questioned shared that opinion); *Silverthorne* v. *United States*, 400 F.2d at 639 ("almost thirty per cent of those examined expressed opinions of appellant's guilt"). Here the trial court expressed its willingness to undertake further inquiry if the voir dire showed it was justified (Tr. 31-32). But at the conclusion of the process the judge reflected that it would have been unwarranted. (Tr. 292) ("[I]t's anybody's guess as to which way they

are leaning. I could see no real indication from the vantage point of the bench as to whether they favored the defense or the Government.").

Moreover, it is mistaken to suggest that this is even a case where the trial court was satisfied with the jurors' own subjective assessment of their impartiality. It is true that the judge did not probe each individual's mind for evidence of bias. But the transcript of the voir dire reveals that the court excused not only those who felt they could not be impartial, but also every juror who had even formed an opinion about the case—an approach that is more protective of petitioners' interests than the constitutional rule laid down in *Irvin* v. *Dowd*, 366 U.S. at 723 (juror not disqualified by "the mere existence of [a] preconceived notion as to the guilt or innocence of an accused"). Nor is this a case in which individual jurors were reluctant to respond to questions put to the panel. Of the 92 prospective jurors interrogated, 42 gave responses that enabled the court to remove them for cause—13 of those because they stated they held an opinion, or a prejudice, about the case.

3. Petitioners also argue (83-858 Pet. 22-25; 83-860 Pet. 15) that the trial court's failure to inquire further into the matter of pretrial publicity impaired their right of peremptory challenge. This claim too is without merit.

It is important at the outset to clarify the nature of petitioners' argument. Under Fed. R. Crim. P. 24(b) petitioners were entitled as a matter of right to a total of ten peremptory challenges. At their request the trial judge granted them 30 (Pet. App. 57a). The court also allowed petitioners to have copies of the official questionnaires filled out by the prospective members of the jury—information to

which again they had no claim of right at the voir dire stage. 2 Wright, *Federal Practice and Procedure* § 382, at 343-344 (1982). Petitioners do not argue that they were actually restricted in their right to use peremptory challenges. Cf. *United States* v. *Turner*, 558 F.2d 535 (9th Cir. 1977). They claim rather that they could have used their challenges to greater effect if they had had more information about how pretrial publicity may have affected each individual juror.

That is a claim that could be made regardless of the extent of the court's examination. For that reason it is not useful to examine the adequacy of the voir dire by asking whether more information would have contributed to the effective exercise of peremptory challenges. See *McDonough Power Equipment, Inc.* v. *Greenwood*, No. 82-958 (Jan. 18, 1984), slip op. 7-8. The only relevant question is whether the examination of prospective jurors gave " 'reasonable assurance that prejudice would be discovered if present.' " *United States* v. *Hawkins*, 658 F.2d at 283. As we have already made clear, the voir dire here provided sufficient assurance in that regard. None of the cases cited by petitioners requires more. See *United States* v. *Johnson*, 584 F.2d 148, 155 (6th Cir. 1978); *United States* v. *Blount*, 479 F.2d 650, 651 (6th Cir. 1973); *United States* v. *Dellinger*, 472 F.2d at 366-370.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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